FOR ARGUMENT

No. 78-1793

In the Supreme Court of the United States

OCTOBER TERM, 1979

WINFIELD L. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. 1a-2a).

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1978, and was amended on February 23, 1979 (Pet. App. 1a-2a). A petition for rehearing was denied on April 30, 1979 (Pet. App.

3a-4a). The petition for a writ of certiorari was filed on May 30, 1979, and was granted on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court improperly considered, as one relevant factor in imposing sentence, petitioner's refusal to cooperate with the government by identifying the persons who supplied him with heroin.

STATUTES INVOLVED

21 U.S.C. 843 provides in pertinent part:

> (b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter [provisions concerned with drug abuse prevention]. Each separate use of a communication facility shall be a separate offense under this subsection. * * *
>
> (c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both * * *.

21 U.S.C. 850 provides in pertinent part:

> * * * no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence under this subchapter or subchapter II of this chapter.

STATEMENT

1. This case arises from a continuing investigation by the Major Crimes Division of the Office of the United States Attorney for the District of Columbia into a large-scale heroin distribution conspiracy (App. 10-12, 14-16). During the course of the investigation, it was observed that the persons under surveillance frequently used a green Jaguar automobile to transport heroin (App. 35). The owner of the Jaguar informed the investigators that she permitted her boyfriend, petitioner Roberts, to use the car (App. 29, 35). Petitioner, who had voluntarily accompanied his girlfriend to the office of the United States Attorney, was then interviewed. Although he was not arrested or taken into custody, he was given *Miranda* warnings and his cooperation in investigating the case was requested (App. 35, 16-17; Jan. 28, 1977 Tr. 37; Oct. 17, 1975 Tr. 7-12, 27-40).[1]

Petitioner was advised by the prosecutor that "the nature and extent of his cooperation would be made known" (App. 35) and would be determinative of the charges that would be brought against him (App.

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[1] "Oct. 17, 1975 Tr." refers to the transcript of proceedings to determine the voluntariness of petitioner's waiver of his *Miranda* rights. "Jan. 28, 1977 Tr." refers to the transcript of proceedings following petitioner's motion to withdraw his first guilty plea.

16). The prosecutor sought petitioner's cooperation in testifying against one of his co-conspirators (Charles Thornton), and in identifying the persons who supplied the heroin that he distributed (App. 16-17, 30, 35-36).

During this interview, petitioner freely admitted his own involvement in the heroin distribution conspiracy. He confessed that he was one of the participants in certain intercepted telephone conversations in which heroin transactions had been planned (App. 16). He also admitted that he used his girlfriend's Jaguar to deliver the heroin and explained the meaning of various code words used in the intercepted telephone conversations (App. 16-17, 36). Petitioner's confession was subsequently found to be the result of a knowing and voluntary waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). See App. 16 n.4; Oct. 17, 1975 Tr. 40. When petitioner was asked to name his suppliers and co-conspirators, however, he refused. His explanation for failing to cooperate in providing the names of his suppliers and co-conspirators was simply that he "wasn't that involved in it" (App. 30). Despite repeated requests, he refused to provide the desired information (App. 36, 38; Oct. 17, 1975 Tr. 12).

2. Petitioner subsequently was arrested and indicted in the United States District Court for the District of Columbia on one count of conspiring to distribute heroin, in violation of 21 U.S.C. 846 and 841, and on four counts of using a telephone to facilitate the distribution of heroin, in violation of 21 U.S.C.

843(b). Following the indictment, plea bargaining discussions ensued (Jan. 28, 1977 Tr. 17-18). During this period, the Assistant United States Attorney attempted to bargain with defense counsel to obtain petitioner's cooperation in identifying his heroin suppliers (*ibid.*). All of the government's proposals for a negotiated guilty plea were rejected (*id.* at 19-21).

On the day of trial, however, the parties consummated a plea agreement under which petitioner pleaded guilty to the conspiracy count and the remaining substantive counts against him were dismissed. The district court imposed a sentence of four to 15 years' imprisonment, a three year special parole term, and a $5,000 fine (App. 22). Petitioner subsequently appealed from this conviction, contending that the terms of the plea agreement were not adequately disclosed to the district court. The court of appeals reversed petitioner's conviction on that ground and permitted him to withdraw his guilty plea. *United States* v. *Roberts*, 570 F.2d 999 (D.C. Cir. 1977).

After the case was remanded to the district court, petitioner once again pleaded guilty, this time to two of the substantive counts in the indictment charging unlawful use of telephone facilities to distribute heroin. The government agreed to dismiss the remaining counts but reserved the "unconditional right to allocute" in favor of a prison sentence that it deemed appropriate (App. 22).

3. Prior to petitioner's sentencing hearing, the government filed a "memorandum on sentencing"

recommending that "maximum consecutive sentences be imposed" (App. 22-23).[2] The government sought a 16 to 48-month sentence on each of the counts to which petitioner pleaded guilty, as well as a $5,000 fine.[3] In explanation of this recommendation, the government referred to petitioner's "prior criminal record" and his culpability as a "supplier" of narcotics (App. 23). The sentencing memorandum also incorporated the reasons set forth in the more extensive memorandum filed prior to petitioner's first sentence (App. 10-21, 23). That memorandum discussed in detail the reasons for imposing a substantial prison term. The memorandum noted that petitioner previously had been convicted on one count of unauthorized use of a vehicle, as well as five counts of federal bank robbery and five counts of local bank robbery (App. 17-21).[4] The sentencing memorandum also pointed out that petitioner was on parole from these convictions when he engaged in the heroin distribution conspiracy (App. 17-21). It further explained that petitioner had been unemployed since he was released from prison despite the fact that he was a young man in good health. Even though un-

[2] Under 21 U.S.C. 843(b), each use of the telephone to facilitate heroin distribution is a separate offense, and consecutive sentences are therefore within the power of the court.

[3] Under 18 U.S.C. 4205(b), the district court is empowered to impose as a minimum sentence one-third of the statutory maximum—in this case, 16 months on each count.

[4] Petitioner served five and one-half years in prison as a result of these convictions (App. 31).

employed, petitioner supported himself in a lavish manner through his heroin dealings (App. 18-19). The sentencing memorandum also referred briefly to petitioner's failure to cooperate by identifying the persons who supplied him with the heroin (App. 17).

4. During the sentencing hearing in the district court, petitioner's counsel argued that the court should impose concurrent rather than consecutive sentences, contending that he was unaware of any prior case in which consecutive sentences had been imposed in similar circumstances (App. 28). Counsel also referred to the fact that petitioner had given the government some assistance by admitting his own criminal activities (App. 29). Counsel gave as petitioner's reason for refusing to identify the other conspirators that he "wasn't that involved in it" (App. 30). He concluded by arguing that the court should give serious consideration to probation in lieu of further imprisonment (App. 32-34).

In reply to defense counsel's arguments, the prosecutor explained his reasons for requesting consecutive prison sentences.[5] The prosecutor noted that the sentence that he recommended was less severe than that imposed after petitioner's first guilty plea (App. 34). He explained that consecutive sentences were appropriate because petitioner had previously been convicted on multiple counts of bank robbery and because petitioner was guilty of distributing heroin,

[5] The prosecutor pointed out that, under his sentencing recommendation, petitioner would be eligible for parole in 11 months due to his credit for prior time served (App. 34).

as opposed to merely using it (App. 37-38). In addition, the prosecutor responded to defense counsel's remarks about the extent of petitioner's cooperation with the government (App. 35-36):

> We solicited Mr. Roberts' cooperation to testify in the Grand Jury and at trial against Mr. Thornton [a co-conspirator]. We promised him that the nature and extent of his cooperation would be made known. Suffice it to say what we offered him was a plea bargain on a silver platter, from which he would have emerged perhaps with some jail time, but with certainly a plea offer to a much less serious offense than what has ultimately transpired in the case.
>
> Thereafter he began to cooperate, as Mr. Palmer [petitioner's counsel] noted. He told us what the terms "street" and "half street" meant. He told us how he delivered drugs in his girlfriend's Jaguar to Mr. Thornton. He told us a number of things which incriminated him. But when we asked him to go a step further and identify the person or persons from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them, he balked.
>
> At that point, despite repeated entreaties to secure his cooperation to go that extra step, he adamantly refused. And of course what resulted was an indictment charging him with conspiracy, and only [four] telephone counts, though there were a maximum of 13 calls we could have indicted him for.

* * * * *

> So as we stand here today, as a prosecutor I am not in a position as I would be in many cases, in dealing with defendants like Mr. Roberts, and cases like this involving drugs, to come to the Court and say, Your Honor, we would ask you to take into account some extenuating and mitigating circumstances, that the defendant has cooperated by providing us with certain information. He has stonewalled it.
>
> So we find it somewhat ironic for counsel to plead on Mr. Roberts' behalf, and to ask for probation, when a defendant over a course of many, many years, knowing what he faces, and knowing that we desired the information, still refuses to disclose it.

The district court imposed a sentence different from that sought by either the prosecutor or defense counsel. In explaining its sentence, the court stated the following (App. 40-41):

> Mr. Roberts, we have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government. Accordingly, it is the judgment of the Court that on each of these two counts you be sentenced to a term of one to four years, that those counts be consecutive, and in addition that there shall be a three-year term of special parole. We are not imposing a fine.

5. On appeal, petitioner argued that the trial judge committed error by failing to recuse himself after

the court of appeals' decision reversing petitioner's first conviction. In the course of arguing that the trial judge was obligated to recuse himself, petitioner raised, for the first time, the contention that the district court had improperly considered the extent of his cooperation in imposing sentence (Ct. App. Br. 15-16). Petitioner also asserted that he "could not be penalized for adhering to his fifth amendment rights and refusal to implicate himself in possibly another conspiracy with other persons unknown" (*id.* at 16).

The court of appeals affirmed petitioner's conviction and sentence without opinion (Pet. App. 1a-2a).[6] A petition for rehearing was subsequently denied, with two judges submitting separate statements.

Judge Bazelon, who voted for rehearing en banc, stated that the district court improperly considered petitioner's refusal to cooperate "as a justification for imposing a more severe sentence" (Pet. App. 6a). Without citation to the record, Judge Bazelon asserted that petitioner "balked only when asked to identify his powerful suppliers, fearing that to do so would endanger his life and possibly incriminate himself in additional conspiracies or criminal activities without benefit of immunity from prosecution" (*id.* at 7a). He also asserted that the prosecutor allocuted for a

[6] Based on the government's stipulation that a special parole term was not authorized by 21 U.S.C. 843(b), that portion of petitioner's sentence was vacated by the court of appeals (Pet. App. 2a).

substantial sentence "in order * * * to punish the defendant for noncooperation" (*id.* at 10a-11a).

Judge MacKinnon filed a separate statement replying to Judge Bazelon (Pet. App. 21a-23a). Judge MacKinnon pointed out that nothing in the record supports the assertion that petitioner received an "enhanced sentence for his failure to cooperate" (*id.* at 21a). He also observed that petitioner's sentence of 2 to 8 years imprisonment is "a very light sentence for a drug *distributor* with a prior conviction for bank robbery. Thus, neither the length of the sentence nor the court's statement at sentencing indicated that Roberts obtained an 'enhanced sentence'. He obtained a sentence that is minimal for his type of continuing egregious conduct * * *" (*ibid.*; emphasis in original).

Judge MacKinnon also observed that this Court's decision in *Brady* v. *United States*, 397 U.S. 742 (1970), recognized the propriety of plea bargaining for cooperation that promotes the administration of justice (Pet. App. 22a). He added that "[w]hether these situations are viewed as facing a more severe sentence for not cooperating or a more lenient sentence for cooperating, the situation is merely two sides of the same coin" (*id.* at 22a-23a). In either event, Judge MacKinnon concluded, the extent of a defendant's cooperation is a relevant factor in exercising the district court's sentencing discretion (*ibid.*).

SUMMARY OF ARGUMENT

I.

The district court properly considered petitioner's refusal to cooperate with the authorities as one relevant factor in imposing sentence. Under 21 U.S.C. 843(c), the district court had a broad range of sentencing options, extending from simple probation to consecutive 16-48 month prison terms with $30,000 fines for each conviction. The court imposed a substantial sentence in light of petitioner's admitted activity as a heroin distributer, his parole status following his release from imprisonment for conviction on ten counts of bank robbery, and his adamant refusal to cooperate with the authorities in identifying the persons who provided him with heroin and who continued to distribute heroin within the community.

While it is not clear whether petitioner's sentence was in fact materially affected by his failure to cooperate with the authorities, that consideration was directly relevant to the exercise of sentencing discretion. His failure to cooperate showed that he was unwilling to take steps to mitigate the antisocial effect of his illegal activities—a factor that bears directly on his amenability to reform and rehabilitation. A substantial prison sentence was also required to protect the community. If petitioner had cooperated with the authorities by identifying his suppliers, this would have terminated his relationship with his criminal associates. Petitioner's refusal to cooperate sug-

gested that he was unwilling to sever his prior relations. The sentencing court could properly infer that someone so disposed would be in a position to return to the criminal conspiracy following his release from prison, a consideration demanding a substantial period of incarceration to protect the public.

Although petitioner now argues that his refusal to cooperate was motivated by a fear of "retaliation" or "self-incrimination," neither of these explanations was ever presented to the prosecutor or the sentencing court. Instead, petitioner simply "stonewalled" the government; the only explanation offered to the sentencing court for his silence was the implausible one that he was not "that involved" in the conspiracy and could not therefore assist in identifying his suppliers. His belated justifications for refusing to cooperate do not undermine his sentence, since he and his attorney had ample opportunity to present all mitigating information prior to the imposition of sentence.

Congress has prescribed that "no limitation shall be placed on the information" that the district court may "receive" and "consider" in imposing sentence (21 U.S.C. 850). This Court has repeatedly held that the trial court may consider evidence bearing on "'every aspect of a defendant's life'" before pronouncing sentence. *United States* v. *Grayson*, 438 U.S. 41, 53 (1978). A defendant's refusal to cooperate with authorities in apprehending co-conspirators who continue to cause serious harm to the community is a relevant datum under *Grayson*.

"Consideration of failure to cooperate with authorities is certainly germane to an evaluation of a defendant's attitude toward society." *United States* v. *Miller*, 589 F.2d 1117, 1139 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979).

Petitioner acknowledges that the extent of a convicted defendant's cooperation with the government is relevant in considering whether to grant leniency, but he asserts that it is not a proper factor in considering "additional punishment." However, there is no indication that the court imposed "additional punishment" on petitioner due to his failure to cooperate. As the colloquy during petitioner's sentencing hearing shows, the prosecutor described the extent of petitioner's cooperation in response to defense counsel's arguments on that subject. The prosecutor explained that leniency—probation or concurrent sentences—would not be appropriate in the present case due to petitioner's admitted activities as a narcotics dealer, his extensive prior criminal record, and his failure to cooperate. Moreover, as Judge MacKinnon properly noted, the sentence actually imposed on petitioner, viewed only in light of the crime that he committed and his past criminal record, was not a severe or disproportionate one.

In any event, failure to cooperate is a proper consideration in deciding whether to impose "additional punishment." The extent of a defendant's cooperation bears directly on his attitude toward society, his continuing dangerousness, and his amenability to reform. There is no logical reason why cooperation should be

relevant but non-cooperation irrelevant in determining an appropriate sentence. "In imposing sentence the Court may consider a defendant's cooperation or lack thereof as long as *all* factors are considered. Thus, reference to a lack of cooperation as a factor does not render a sentence subject to resentencing because of any infirmity therein." *United States* v. *Barnes*, 604 F.2d 121, 153-154 (2d Cir. 1979), petition for cert. pending, No. 79-261 (citation omitted; emphasis in original).

II.

Petitioner's refusal to cooperate with the authorities did not constitute an exercise of Fifth Amendment rights. Throughout the three-year period that followed petitioner's initial interview and preceded imposition of his sentence, petitioner never suggested that his refusal to cooperate rested on Fifth Amendment grounds or that he was declining to incriminate other persons because he was fearful of implicating himself in additional crimes. Instead of asserting any right under the Fifth Amendment, petitioner repeatedly waived his Fifth Amendment rights. During his initial interview, he freely confessed his own misconduct, a confession that was later determined to be a voluntary and intelligent waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). During subsequent plea negotiations when his cooperation was once again sought, he never indicated that his refusal to give it was motivated by concern over self-incrimination. During the sentencing hearing following his guilty plea, petitioner's counsel ad-

dressed the question of his failure to cooperate but never suggested that it rested on Fifth Amendment grounds. Instead, he explained that petitioner's failure to provide information was due to his limited involvement in the heroin conspiracy.

As this Court repeatedly has held, the Fifth Amendment may not be relied on unless it is invoked in timely fashion. *Garner* v. *United States*, 424 U.S. 648, 655 (1976). In this case, as in *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927), petitioner "did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought." The Court added in *Vajtauer* that "[t]he privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it." *Ibid.* This principle requires a convicted defendant who believes that his failure to cooperate is privileged on Fifth Amendment grounds to invoke the privilege before sentence is pronounced. "If [petitioner] had felt that he would be criminally implicated in any way by the information which he had at his disposal, but which he wished to share with authorities * * * he could have asserted his Fifth Amendment privilege before the [sentencing] Court." *United States* v. *Vermeulen*, 436 F.2d 72, 76-77 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971).

Nor was petitioner's refusal to cooperate shielded from the scrutiny of the sentencing court by *Miranda* v. *Arizona*, *supra*. Although *Miranda* enables a suspect subject to custodial interrogation to terminate questioning and prevents the prosecutor from subsequently using the suspect's silence during interrogation as evidence against him at trial, the safeguards of *Miranda* apply only in the context of custodial interrogation. "All *Miranda*'s safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody." *United States* v. *Washington*, 431 U.S. 181, 187 n.5 (1977). As the Court emphasized in *Miranda*, *supra*, 384 U.S. at 477-478, "general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."

In the present case, petitioner's failure to cooperate with authorities cannot be viewed as an effort to terminate questioning during custodial interrogation within the meaning of *Miranda*. Petitioner was never subjected to custodial interrogation. In addition, he refused to cooperate throughout the entire period between his first interview in 1975 and the imposition of sentence in 1978. He was fully apprised that his failure to cooperate would be made known and would affect his exposure to criminal penalties. This is thus not a case such as *Doyle* v. *Ohio*, 426 U.S. 610

(1976), in which the defendant may have been misled about the consequences of his refusal to divulge information. In sum, there is no warrant for extending the reasoning of *Miranda* to the circumstances involved in this case.

III.

There is no basis for disturbing petitioner's sentence under the "supervisory powers" doctrine. This Court has repeatedly disavowed any "supervisory" role with respect to sentences that are imposed within statutory limits and do not infringe any constitutional right. See *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974). " 'If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.' " *Ibid.*

The sentencing court did not comport itself improperly in any way. At no time did the court "participate" in plea discussions contrary to Fed. R. Crim. P. 11(e)(1). Nor did the trial court improperly take sides with the prosecutor in considering petitioner's failure to cooperate. The trial court reviewed all of the evidence relevant to the exercise of its sentencing discretion, as presented both by defense counsel and the prosecutor. See Fed. R. Crim. P. 32(a)(1). The court did not attempt to bargain with petitioner, to coerce him into cooperating with the

prosecutor or to penalize the exercise of any constitutional right. Instead, it afforded retrospective consideration to all of the relevant facts—including petitioner's conviction for the serious crime of distributing heroin, his prior convictions for bank robbery, and his refusal to help the authorities deal with the grave problems to which his own illegal activities had contributed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONSIDERED PETITIONER'S REFUSAL TO COOPERATE WITH THE GOVERNMENT AS ONE RELEVANT FACTOR IN IMPOSING SENTENCE

Under the provision authorizing petitioner's sentence, 21 U.S.C. 843(c), Congress has vested the district court with broad sentencing discretion. At one extreme, the court may impose a sentence of probation. At the other, it is empowered to impose consecutive four year prison sentences and $30,000 fines based on each separate use of the telephone to distribute heroin. Moreover, under 18 U.S.C. 4205(b), the court may also impose a minimum sentence that must be served before the defendant can be considered for parole. That minimum sentence may be up to one-third of the statutory maximum (here, 16 months on

each count). See *United States* v. *Addonizio*, No. 78-156 (June 4, 1979), slip op. 10-11 n.15.[7]

The district court imposed a sentence in this case that was neither the maximum nor the minimum. The sentence approached the maximum, however, and was justified by reference to petitioner's prior convictions for serious offenses, including bank robbery, and petitioner's admitted role as a heroin dealer. The court also referred to the fact that petitioner failed to cooperate with the authorities despite repeated requests for cooperation. Consideration of petitioner's failure to cooperate, like his prior criminal record and his significant role in a large-scale heroin distribution scheme, was entirely proper.[8]

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[7] As the House Committee noted, the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, which contains the provision under which petitioner was sentenced, gives "maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case." H.R. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. 11 (1970); see also *id.* at 8-9.

[8] There is no merit to the repeated assertion of amici American Civil Liberties Union and National Capital Area Civil Liberties Union that petitioner's failure to cooperate was "the controlling factor in the decision to impose maximum consecutive four year sentences" (Amici Br. 9, 19), or resulted in "a conclusive inference of poor rehabilitative prospects" (*id.* at 5). The trial judge listened to extensive allocutions which discussed all pertinent factors, noted that it had considered the case carefully, and recited several relevant considerations in pronouncing sentence (App. 40).

A. Petitioner's refusal to cooperate showed that he was unwilling to accept responsibility for the consequences of his actions, was a poor prospect for rehabilitation, and was likely to pose a continuing danger to the community

1. Analysis of the factors relevant in imposing sentence requires brief reference to the underlying purposes of criminal sentencing. There is general agreement that the purposes of criminal sentencing include the following: a) rehabilitation of offenders;[9] b) protection of society by confining offenders with antisocial tendencies;[10] c) retribution for and denunciation of antisocial conduct;[11] d) deterrence of others who might engage in such conduct;[12] and e)

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[9] See *Williams* v. *New York*, 337 U.S. 241, 248-249 n.13 (1949); *United States* v. *Grayson*, 438 U.S. 41, 47-52 (1978); National Council on Crime and Delinquency, *Model Sentencing Act* § 1 (1972).

[10] *Williams* v. *New York, supra; United States* v. *Brown*, 381 U.S. 437, 458 (1965); ABA, *Minimum Standards For Criminal Justice: Sentencing Alternatives and Procedures* §§ 2.2, 2.5(c)(i), 3.4(b)(iv), at 14, 17, 24 (Approved Draft 1968).

[11] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 14 (1967); P. O'Donnell, M. Churgin, & D. Curtis, *Toward a Just and Effective Sentencing System* 48-49 (1977); H.L.A. Hart, *Punishment and Responsibility* 9 (1968).

[12] *Williams* v. *New York, supra; Model Penal Code* § 1.02(2) (Proposed Official Draft 1962); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts, supra*, at 14.

promotion of the efficient administration of justice.[13] Petitioner's failure to cooperate was a direct indication that a substantial period of imprisonment was required to vindicate these purposes.

Petitioner's failure to cooperate with authorities by naming the persons who provided him with heroin showed that he was unwilling to take steps to help mitigate the antisocial effects of his illegal activities. It is beyond dispute that heroin distribution contributes to the addiction of members of the community and spurs criminal actions by persons who become addicts. Petitioner admitted that he caused this injury to society, but he refused to take steps to help society ameliorate the injury. A convicted heroin dealer who refuses to make amends for his actions is a poor candidate for rehabilitation—"rehabilitation requires his recognition of community interests and of the obligations of community life." Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 437 (1958).

A substantial prison sentence was also required to protect the community. If petitioner had cooperated with authorities by identifying his suppliers, this would effectively have terminated his relationship with his criminal associates. But by refusing to help authorities apprehend such persons and put an end to their illegal activities, petitioner showed that he

[13] *Brady* v. *United States*, 397 U.S. 742, 752-753 (1970); *Corbitt* v. *New Jersey*, 439 U.S. 212, 220-224 (1978); R. Dawson, *Sentencing: The Decision as to Type, Length and Conditions of Sentence* 173-192 (1969).

was unwilling to sever his prior relations. The sentencing court could fairly conclude that someone so disposed would be in a position to return to the criminal conspiracy upon release from prison, a consideration demanding a substantial period of incarceration to protect the public.

Petitioner's failure to cooperate with authorities after admitting his involvement in a heroin distribution conspiracy demanded a stern response to promote respect for the law and to underscore the seriousness of his offense. Offenders who repeatedly engage in serious crimes and who give every appearance of continuing to be at "war" with society (*Williams* v. *New York*, *supra*; *United States* v. *Grayson*, 438 U.S. 41, 51 (1978)), are deserving of substantial punishment to exemplify the gravity of their misconduct.

Finally, failure to cooperate with the authorities shows an unwillingness to pay the price that society demands in return for sentence concessions. Although petitioner provided some cooperation by admitting his own misconduct, he refused to identify other persons who continued to participate in the criminal venture. Petitioner was thus unwilling to establish his entitlement to leniency by extending a reciprocal benefit to the state. *Brady* v. *United States*, *supra*, 397 U.S. at 753.

Although petitioner and amici contend (Br. 11-12, 17-18; Amici Br. 6-20) that petitioner's failure to cooperate was motivated by a desire to avoid retaliation or self-incrimination, the record directly refutes

such arguments. (We address petitioner's self-incrimination arguments in detail at pages 34-49, *infra*.) Petitioner was notified during his first interview in 1975 that the extent of his cooperation would be made known to the court and would determine the charge against him (App. 35-36). He never suggested, however, that he was refusing to cooperate due to fear of retaliation or of self-incrimination. His only explanation for refusing to name his suppliers, as stated by his attorney during allocution, was that he "wasn't that involved" in the heroin distribution conspiracy (App. 30).[14] Moreover, after the prosecutor described petitioner's refusal to cooperate to the sentencing judge, petitioner and his counsel offered no further explanation for the refusal, contending instead that the government's sentencing recommendation should be disregarded because the government was "mad at Mr. Roberts" (App. 39). Under these circumstances, the sentencing court properly considered petitioner's failure to cooperate as reflecting a refusal to disavow his prior criminal allegiances. Petitioner presented no information to the prosecutor or the sentencing judge that would suggest that his non-cooperation had any other basis.

2. The district court's consideration of petitioner's failure to cooperate—together with his disingenuous explanation for non-cooperation—was entirely consist-

[14] That explanation was implausible (Oct. 17, 1975 Tr. 12). Petitioner was the middleman in the distribution process (App. 36) and played a central role in the illegal scheme (*id.* at 15-17).

ent with the congressional directive that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence * * *" (21 U.S.C. 850; see also 18 U.S.C. 3577). This Court has also emphasized that the sentencing judge may consider all available information bearing on the "convicted person's past life, * * * habits, conduct, and mental and moral propensities." *Williams* v. *New York*, *supra*, 337 U.S. at 245. The Court explained in *Williams* that the sentencing court must have "the fullest information possible concerning the defendant's life and characteristics" (*id.* at 247)—information extending to "every aspect of a defendant's life" (*id.* at 250).

These considerations were recently reiterated by the Court in *United States* v. *Grayson*, *supra*, which held that the sentencing court may take into account the defendant's commission of perjury during the course of trial. The Court explained that such actions are "probative of his attitudes toward society and prospects for rehabilitation" (438 U.S. at 50). Even though a defendant is subject to strong pressures to commit perjury in his own defense, the Court concluded that such conduct is a proper basis for imposing punishment because the " 'universal and persistent' foundation stone in our system of law, and particularly in our approach to punishment, sentencing, and incarceration, is the 'belief in freedom of the human will and a consequent ability and

duty of the normal individual to choose between good and evil.'" *Id.* at 52. In selecting an appropriate sentence, the Court emphasized, it is necessary "to consider the defendant's whole person and personality * * *. The 'parlous' effort to appraise 'character' * * * degenerates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning 'every aspect of a defendant's life'" (*id.* at 53).

These principles have been repeated throughout the opinions of this Court discussing the sentencing discretion of trial judges. See, *e.g.*, *Pennsylvania* v. *Ashe*, 302 U.S. 51, 55 (1937) ("[J]ustice generally requires * * * that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him."). See also *United States* v. *Tucker*, 404 U.S. 443, 446 (1972) ("[A] trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose. * * * [B]efore making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.").

Consistent with these principles, the lower courts have frequently approved the practice of considering the extent of the defendant's cooperation prior to imposing sentence. See, *e.g.*, *United States* v. *Barnes*, 604 F.2d 121, 153-154 (2d Cir. 1979), petition for

cert. pending, No. 79-261 (sentencing court may consider non-cooperation along with other relevant factors); *United States* v. *Miller*, 589 F.2d 1117, 1137-1139 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979), ("Consideration of failure to cooperate with authorities is certainly germane to an evaluation of a defendant's attitude toward society"); *United States* v. *Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974), cert. denied, 423 U.S. 897 (1975); *United States* v. *Hayward*, 471 F.2d 388, 390-391 (7th Cir. 1972); *United States* v. *Chaidez-Castro*, 430 F.2d 766, 770-771 (7th Cir. 1970); *United States* v. *Vermeulen*, 436 F.2d 72, 75-77 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971). See also *United States* v. *Richardson*, 582 F.2d 968, 969 (5th Cir. 1978). The importance of a defendant's cooperation or non-cooperation in determining an appropriate sentence has also been recognized in sentencing institutes and scholarly studies. See, *e.g.*, ABA, *Minimum Standards for Criminal Justice: Pleas of Guilty* § 1.8 (a)(v) (see also commentary at pages 48-49) (Approved Draft 1968); R. Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence* 177-178 (1969); D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* 186-187 (1966). These authorities confirm the propriety of the district court's consideration of the extent of petitioner's cooperation in imposing sentence in the present case.[15]

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[15] See also Lumbard, *Sentencing and Law Enforcement*, 40 F.R.D. 406, 413 (1967); Bennett, *Individualizing the Sen-*

B. A convicted defendant's failure to cooperate with authorities is a relevant aggravating factor, just as his affirmative cooperation would be a relevant mitigating factor

Both petitioner and amici agree (Br. 14, 17; Amici Br. 19 n.8) that the extent of a convicted defendant's cooperation is relevant in granting leniency. They insist, however, that lack of cooperation may not be considered as a basis for enhancing a sentence.[16]

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tencing Function, 27 F.R.D. 359, 364 (1961); Herlands, *When and How Should a Sentencing Judge Use Probation*, 35 F.R.D. 487, 496 (1964). The degree of the convicted defendant's cooperation with the authorities is customarily evaluated in his presentence report. See Administrative Office of the United States Courts, Division of Probation, *The Presentence Investigation Report* 8 (1978); see also *id.* at 15. Cooperation with authorities is also considered to be a valid sentencing criterion in English courts. See R. Cross, *The English Sentencing System* 154-156 (1971). As this Court noted in *Branzburg* v. *Hayes*, 408 U.S. 665, 696 (1972), there is little to recommend the concealment of information needed to uncover criminal activity. The Court observed that "historically, the common law recognized a duty to raise the 'hue and cry' and report felonies to authorities." *Ibid.* (footnote omitted).

[16] Some lower court opinions have expressed the view that cooperation is a relevant mitigating factor, while noncooperation is irrelevant. See *DiGiovanni* v. *United States*, 596 F.2d 74, 75 (2d Cir. 1979); *United States* v. *Ramos*, 572 F.2d 360, 363 n.2 (2d Cir. 1978) (concurring opinion). The Second Circuit's latest decision on this question, *United States* v. *Barnes*, *supra*, 604 F.2d at 154, expressly rejects this distinction ("In imposing sentence the court may consider a defendant's cooperation or lack thereof as long as *all* factors are considered. * * * Thus, reference to a lack of cooperation as a factor does not render a sentence subject to resentencing because of any infirmity therein.").

1. As Judge MacKinnon pointed out in his separate statement in the court below (Pet. App. 21a), the present record affords no basis for concluding that "an enhanced sentence" was imposed on petitioner due to his failure to cooperate. As noted on pages 7-9, *supra*, the prosecutor's discussion of the extent of petitioner's cooperation was offered in response to the allocution of petitioner's counsel. Counsel asserted that petitioner had willingly implicated himself and that he failed to implicate others only because of his limited involvement in the conspiracy. Counsel ended his allocution by asking the trial court to impose a probationary sentence. The prosecutor responded by pointing out that petitioner had "stonewalled" the government by failing to provide information accessible to him. He argued that petitioner's limited cooperation should not therefore be viewed as an "extenuating" or "mitigating" circumstance (App. 36). The prosecutor at no time stated that he sought "additional" punishment based on petitioner's failure to cooperate.

Moreover, as Judge MacKinnon observed, the sentence imposed on petitioner was not a severe one when his conduct and prior criminal record are considered (Pet. App. 21a). Petitioner had previously been convicted on ten counts of bank robbery and was on parole from his sentence for those offenses at the time of his present offenses (App. 17).[17] He also

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[17] The record does not indicate how many separate bank robberies underlay those convictions.

had been convicted of petit larceny and had been arrested for drunkenness, disorderly conduct, and housebreaking (App. 43). His role in the crimes charged in the present indictment was that of a major narcotics distributer engaged in a highly lucrative business, not a mere drug user. These facts, standing by themselves, fully justified petitioner's two to eight year sentence,[18] which, in fact, was substantially less than the original sentence imposed after his first guilty plea (4-15 years' imprisonment)—a sentence imposed by the court without reference to the issue of cooperation. Finally, nothing in the district court's explanation of its two to eight year sentence suggests that it was imposing "additional" punishment on petitioner for failing to cooperate. Rather, the court simply enumerated the relevant factors that it took into account in reaching its decision—petitioner's prior criminal record, the seriousness of his offenses, and his unwillingness to cooperate (App. 40).

2. In addition, we see no meaningful distinction between "enhancing" punishment for non-cooperation (which petitioner and amici oppose) and denying "leniency" to those who fail to cooperate (which petitioner and amici apparently would countenance).[19]

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[18] The district court declined to fine petitioner or impose maximum prison time before parole eligibility.

[19] On the facts of this case, it is not possible to speak meaningfully of imposing "additional punishment." There is no normative sentence that persons in petitioner's position could

Under petitioner's proposed sentencing scheme, the sentencing court would grant leniency to those who cooperate while denying that benefit to those who do not. This would effectively create two levels of punishment premised on the extent of a defendant's cooperation.[20] Cooperation would be the occasion for a relatively light sentence, and non-cooperation the occasion for a more severe sentence. All of the pressures that petitioner and amici complain of (Br. 10-13; Amici Br. 26-27, 36-37) would be present in a system in which "leniency" is granted to those who cooperate but denied to those who do not. Persons wishing to avoid longer sentences would inevitably be subjected to pressure to cooperate with the authorities, regardless of whether the disincentive is char-

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expect to receive apart from the question of cooperation or non-cooperation. The trial judge has a broad range of sentencing options ranging from probation to consecutive 16-48 month sentences with $30,000 fines on each count of the indictment. The appropriate point on this spectrum is determined by considering all relevant factors. The fact that consecutive sentences are not ordinarily imposed in the District of Columbia based on multiple uses of the telephone to distribute heroin does not limit the district court's discretion. Congress has provided that each such use is a separate offense, carrying a separate penalty. When the defendant's conduct and prior criminal record strongly suggest the likelihood of future misconduct, the full range of sentencing options is properly considered. See *Pennsylvania* v. *Ashe*, *supra*, 302 U.S. at 54-55: "Persistence in crime and failure of earlier discipline effectively to deter or reform justify more drastic treatment."

[20] The term "leniency" would have no meaning if there were no difference between sentences imposed on those who cooperate and those who do not cooperate.

acterized as "denying leniency" or "imposing additional punishment." As Judge MacKinnon pointed out, these characterizations are simply "two sides of the same coin" (Pet. App. 23a).

We also submit that it would be perfectly proper for a district court, in imposing sentence, explicitly to predicate "additional punishment" on a defendant's failure to cooperate (something that the court did not do in the present case). For example, if a sentencing judge were separately to determine the sentence that would be appropriate in light of all relevant factors apart from non-cooperation, and were then to add to that sentence an additional year's imprisonment based solely on non-cooperation, his disposition would be permissible if the sentence remained within statutory limits. As we have noted, the decisions of this Court establish that trial courts possess broad discretion to impose sentences within statutory limits and may consider the entire range of factors bearing on a convicted defendant's character, amenability to reform, and attitude toward society. There is no logical reason why those factors should be pertinent only when considering the possibility of affording "leniency" to a convicted defendant.[21]

Consideration of a defendant's failure to cooperate —even as an aggravating factor—presents no question of unfairness so long as the defendant has an opportunity to cooperate and has a chance to explain

[21] As discussed on pages 49-50, *infra*, this Court repeatedly has held that sentences imposed within statutory limits are not subject to review on grounds of undue severity.

why his non-cooperation should not be penalized. In the present case, petitioner was advised from the outset that the extent of his cooperation would be made known and would affect his punishment. Plea negotiations focused on his cooperation. He also had the opportunity to explain to the prosecutor and sentencing judge why his non-cooperation should not be considered.[22] If petitioner believed that his cooperation could result in retaliation by others he should have explained this to the prosecutor and the judge so that the basis for his concern could be examined and steps taken to protect him. See *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961) (the government can protect witnesses from retaliation); see also Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title V, 84 Stat. 933-934 (government witness protection program). Perhaps the court would

[22] See generally Fed. R. Crim. P. 32(a)(1) (the defendant and his attorney may "present any information in mitigation of punishment" before sentence is pronounced); ABA, *Minimum Standards for Criminal Justice: Sentencing Alternatives and Procedures* § 5.3 (Approved Draft 1968). Contrary to the suggestion of amici (Amici Br. 2, 6-19), the sentence in this case did not rest on "false" information or "arbitrary" considerations. Petitioner and his counsel had the opportunity to explain petitioner's reasons for failing to identify his suppliers. The reason actually proffered—minimal involvement in the conspiracy—was implausible. In this Court, petitioner offers little more by way of explanation. He asserts, without citation of authority, that "[i]n remaining silent about his confederates petitioner was not called upon to detail his reasons for doing so; indeed, that judicial inquiry would itself have been improper" (Br. 11-12)—a singular argument for a convicted heroin dealer with an extensive prior criminal record who appealed to the district court for probation.

have been influenced in its sentencing decision by such an explanation. But in its absence, and in face of petitioner's unpersuasive explanation for refusing to cooperate, the district court had no ground for concluding that petitioner's refusal to cooperate had a justifiable basis.

II. PETITIONER'S REFUSAL TO COOPERATE WITH THE AUTHORITIES WAS NOT AN EXERCISE OF FIFTH AMENDMENT RIGHTS

Petitioner contends (Br. 8-13) that the district court's consideration of his failure to cooperate as one relevant factor in imposing sentence resulted in his being "punished * * * for exercising his Fifth Amendment right against self-incrimination." (See also Amici Br. 21-30.)

However, the record in this case establishes that petitioner was not punished for exercising any constitutional right. In fact, petitioner willingly disclosed his own illegal activities during his initial interview with the United States Attorney. This self-incrimination was subsequently found to be a knowing, voluntary, and intelligent waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). See App. 16 n.4. It was only when petitioner was asked for information about the identity of other conspirators that he stated that he would not provide such information, explaining (in the words of his attorney) that he "wasn't that involved in it" (App. 30). Petitioner was repeatedly informed that the extent of his cooperation would be made known and would affect the disposition of his case (App. 16, 30, 35). At no time did he suggest that his refusal to incriminate *other* persons resulted from a fear of self-incrimination.

During the ensuing plea bargaining process, petitioner's cooperation was again solicited and denied (Jan. 28, 1977 Tr. 17). Neither petitioner nor his counsel suggested that his refusal to cooperate was predicated on an exercise of constitutional rights. At no time was immunity from prosecution for "other crimes" sought by petitioner or his counsel.

Petitioner subsequently pleaded guilty, first to the conspiracy count and then, after a successful appeal from his conviction, to two of the substantive counts contained in the indictment. During the ensuing sentencing hearing, defense counsel discussed the extent of petitioner's cooperation; he did not contend that petitioner's refusal to cooperate was an impermissible sentencing consideration, nor did he indicate that it rested on an exercise of Fifth Amendment rights.

Only on appeal from his conviction did petitioner argue, for the first time, that it was not proper to consider his non-cooperation because this would be equivalent to penalizing his exercise of Fifth Amendment rights (Ct. App. Br. 16).[23]

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[23] The government pointed out in its brief in the court of appeals that petitioner's Fifth Amendment argument was an afterthought raised for the first time on appeal and that the Fifth Amendment would not in any event privilege a refusal to incriminate other persons (Ct. App. Br. 23 n.11). The court of appeals affirmed petitioner's conviction without opinion (Pet. App. 1a-2a).

A. Petitioner Failed To Invoke The Fifth Amendment

At no time during the three-year period following petitioner's first interview and preceding the imposition of his sentence did petitioner invoke the Fifth Amendment privilege against compelled self-incrimination as a basis for withholding information from the prosecutor. To the contrary, his actions confirmed that he did not intend to exercise the privilege. He knowingly waived his *Miranda* rights and incriminated himself. His only reluctance pertained to incriminating other persons—a form of incrimination that is not shielded by the Fifth Amendment. See, *e.g.*, *Rogers* v. *United States*, 340 U.S. 367, 370-375 (1951); *United States* v. *Mandujano*, 425 U.S. 564, 572 (1976). Following petitioner's guilty plea (a waiver of Fifth Amendment rights as to the charges subject to the plea; see *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969); *Brady* v. *United States*, 397 U.S. 742, 748 (1970)), the remaining conspiracy count and substantive counts against petitioner were dismissed.[24] During the sentencing hearing, petitioner's attorney fully disclosed petitioner's failure to cooperate with the government. He never suggested that the sentencing judge should disregard the extent of petitioner's cooperation and never attempted to invoke the Fifth Amendment.

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[24] Petitioner was not subject to reprosecution on the dismissed counts. See, *e.g.*, *United States* v. *Stricklin*, 591 F.2d 1112, 1123 n.3 (5th Cir. 1979), cert. denied, No. 79-307 (Nov. 26, 1979).

The Fifth Amendment provides effective protection against compelled self-incrimination. *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). An exercise of Fifth Amendment rights, when properly invoked, cannot be penalized. *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968). The privilege does not apply, however, unless it is timely exercised. This principle is illustrated by the case of *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103 (1927), in which an alien subject to deportation proceedings refused to provide information that arguably tended to show his involvement in illegal subversive activities. He contended on appeal that his refusal to provide that information was privileged under the Fifth Amendment. This Court rejected that contention in words that are directly applicable here (*id.* at 112-113):

> Assuming that the constitutional immunity against self-incrimination may be violated as well by inferences drawn from silence with respect to incriminating matters as by testimony which the witness is compelled to give, still it is necessary to inquire whether the appellant here has brought himself within the protection of the immunity.
>
> Throughout the proceedings before the immigration authorities, he did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought. It is for the tribunal conducting the trial to determine what weight should be given to the contention of the

> witness that the answer sought will incriminate him, * * * a determination which it cannot make if not advised of the contention. * * * The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it.

As the Court reaffirmed in *Garner* v. *United States*, 424 U.S. 648, 655 (1976), a timely exercise of Fifth Amendment rights is a necessary prerequisite to any claim of privilege:

> Unless a witness objects, [the] government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating. Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege.

The Court added that "the claim of privilege ordinarily must be presented to a 'tribunal' for evaluation at the time disclosures are initially sought." *Id.* at 658 n.11. This Court has restated that basic principle on many occasions. See, *e.g.*, *United States* v. *Mandujano*, *supra*, 425 U.S. at 574-575; *Maness* v. *Meyers*, 419 U.S. 449, 466 (1975); *United States* v. *Kordel*, 397 U.S. 1, 7-10 (1970); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 107 (1961); *Rogers* v. *United States*, *supra*, 340 U.S. at 370-375.

Consistent with this principle, a convicted defendant who refuses cooperation in order to avoid a risk

of self-incrimination must disclose this basis for his action and invoke the privilege before sentence is imposed in order to preserve any Fifth Amendment claim. See *United States* v. *Vermeulen*, *supra*, 436 F.2d at 76-77:

> The gravamen of appellant's contention is that by remaining silent, his failure to cooperate with any public official * * * led to a harsher sentence which imposed an unconstitutionally "costly" penalty for the exercise of his rights under the Fifth Amendment. * * *
>
> If appellant had felt that he would be criminally implicated in any way by the information which he had at his disposal, but which he wished to share with authorities for his own benefit by "singing," he could have asserted his Fifth Amendment privilege before the Court. This would have put the Government and the Court on notice so that the situation might have been altered by a grant of immunity from future criminal prosecution. The possibility of immunity was never suggested, however, and the Fifth Amendment privilege was never raised below.

If petitioner had timely invoked the Fifth Amendment prior to the imposition of sentence and explained that he was prepared to name his co-conspirators but for the possibility of self-incrimination with respect to other crimes, the sentencing court could have determined if there was any basis for invoking the Fifth Amendment. See *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951) ("[H]is say-so does not itself establish the hazard of incrimination. It is

for the court to say whether his silence is justified * * *."); *Rogers* v. *United States*, *supra*, 340 U.S. at 374-375; *Mason* v. *United States*, 244 U.S. 362, 364-367 (1917).

Moreover, if petitioner had indicated a willingness to cooperate but raised a Fifth Amendment privilege claim, the prosecutor could have considered the advisability of obtaining immunity to displace the asserted privilege (see 18 U.S.C. 6002) or considered entering into a binding plea agreement that would protect petitioner from prosecution for other crimes (see *Santobello* v. *New York*, 404 U.S. 257, 262 (1971)). Petitioner's failure to invoke the privilege frustrated this procedure. See *United States* v. *Mandujano*, *supra*, 425 U.S. at 575; see also *Garner* v. *United States*, *supra*, 424 U.S. at 658 n.11 ("[E]arly evaluation of claims allows the Government to compel evidence if the claim is invalid or if immunity is granted and therefore assures that the Government obtains all the information to which it is entitled.").[25]

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[25] Where, as here, the potential witness does not claim the privilege but simply "stonewalls" the government, the prosecutor has no basis for deciding whether to confer immunity. When the defendant refuses to cooperate by supplying information unknown to the prosecutor, a grant of immunity and compulsion to testify ordinarily will prove unproductive. The non-cooperating witness usually can commit perjury with relatively little risk of prosecution. In a case such as this, in which the prosecutor has no independent information about the identity of a heroin supplier, the defendant is free to provide false information (*e.g.*, "I got the heroin from a man in the park named John; I never knew his last name."). Thus, as a practical matter, an invocation of the Fifth Amendment—which explains the defendant's refusal to cooperate and shows that he is not simply "stonewalling" the government—is essential if immunity is to be seriously considered. See *United States* v. *Mandujano*, *supra*, 425 U.S. at 575. In light of petitioner's adamant refusal to cooperate in the present case, without any suggestion that his non-cooperation stemmed from a fear of self-incrimination, it was entirely reasonable for the prosecutor to give no consideration to use of the immunity statute to displace the protection afforded by the Fifth Amendment. Immunity from prosecution is not lightly conferred on persons believed to be law violators. Immunity is not considered absent a reasonable assurance of reciprocal benefits from the suspect.

In sum, by failing to make a timely invocation of the Fifth Amendment, petitioner prevented the district court from evaluating his claim to determine whether or not it was a "subterfuge" (*United States* v. *Mandujano*, *supra*, 425 U.S. at 575) used "for the real purpose of securing immunity to some third person, who is interested in concealing the facts" (*Brown* v. *Walker*, 161 U.S. 591, 600 (1896)). His failure to invoke the Fifth Amendment also prevented the prosecutor from considering the advisability of obtaining immunity to displace the privilege. Moreover, because the district court was not alerted to the possibility that petitioner believed that his non-cooperation might have been privileged under the Fifth Amendment—indeed, was invited to consider the extent of petitioner's cooperation by the allocution of defense counsel—the court had no occasion to exclude it from its evaluation. In these circumstances, petitioner's Fifth Amendment arguments are properly dismissed as a mere "afterthought."

Vajtauer v. *Commissioner of Immigration, supra,* 273 U.S. at 113.[26]

B. Petitioner's Non-Cooperation Was Not Privileged Under *Miranda* v. *Arizona*

Petitioner also contends—in an argument raised neither in the district court nor the court of appeals—that his non-cooperation was privileged under *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and should not therefore have been taken into account at the time of sentencing (Br. 8-10; see also Amici Br. 16 n.7, 25).[27] *Miranda* offers no support, however, to petitioner's contentions.

1. *Miranda* held that persons interrogated while in police custody must be warned that they have the right to remain silent, that statements made during interrogation can be used against them, and that

[26] The court of appeals' opinions holding on Fifth Amendment grounds that it is improper to take into account a convicted defendant's non-cooperation in imposing sentence do not consider or decide the question which is dispositive here—petitioner's failure to make a timely assertion of Fifth Amendment rights. See *United States* v. *Rogers,* 504 F.2d 1079 (5th Cir. 1974); *United States* v. *Garcia,* 544 F.2d 681 (3d Cir. 1976). The general arguments of petitioner and amici about "penalizing" the exercise of constitutional rights may have relevance to "third parties in hypothetical situations" (*County Court of Ulster County* v. *Allen,* No. 77-1554 (June 4, 1979), slip op. 13), but they have no bearing on the facts presented in this case.

[27] Absent exceptional circumstances, this Court does not review arguments that have not been raised in the lower courts. See, *e.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977).

they have the right to the presence of an attorney (who will be appointed if they cannot afford to retain an attorney). 384 U.S. at 479. If the interrogated party indicates "at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege." *Id.* at 474 (footnote omitted).[28]

The rules prescribed in *Miranda* are rules of special application to the inherently coercive situation of "custodial interrogation." *Miranda* does not purport to alter the ordinary principles of Fifth Amendment law, summarized above, that apply outside the context of custodial interrogation. See *Garner* v. *United States, supra,* 424 U.S. at 657-658; *United States* v. *Mandujano, supra,* 425 U.S. at 578-584; *Beckwith* v. *United States,* 425 U.S. 341, 345-348 (1976); *Oregon* v. *Mathiason,* 429 U.S. 492, 495-496 (1977). See also *United States* v. *Washington,* 431 U.S. 181, 187 n.5 (1977) ("All *Miranda*'s safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody.").

Petitioner's continuous course of non-cooperation with the authorities cannot be viewed as an attempt to terminate questioning during custodial interro-

[28] These procedural safeguards "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan* v. *Tucker,* 417 U.S. 433, 444 (1974).

gation. At the time when he was first interviewed and his cooperation was solicited, petitioner had come voluntarily to the office of the United States Attorney to accompany his girlfriend. He was not under arrest and his freedom was not impaired (Oct. 17, 1975 Tr. 7-12, 27-40; App. 16-17, 29-30, 35-36).[29] See *Oregon* v. *Mathiason*, *supra*, 429 U.S. at 495 ("[T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½ hour interview respondent did in fact leave the police station without hindrance."). Following his indictment and arrest several weeks later, the government negotiated with petitioner's counsel, seeking petitioner's cooperation in identifying his heroin supplier (Jan. 28, 1977 Tr. 17). Petitioner continued to refuse to cooperate up to his sentencing hearing (App. 30, 39).

In sum, the refusal to cooperate with authorities involved in this case cannot be analogized to a failure to answer questions during custodial interrogation without benefit of counsel; rather, petitioner manifested a consistent unwillingness to cooperate during the entire period between the first interview in 1975

[29] While *Miranda* warnings must precede custodial interrogation, the warnings may be and often are administered, from an abundance of caution, even though the recipient of the warnings is not in custody. Thus, the fact that petitioner was warned does not show that he was subjected to custodial interrogation.

and the time of his sentencing in 1978, during much of which he was not in custody and was represented by counsel (App. 36). The *Miranda* rules, which privilege a suspect's silence during custodial interrogation, have no application to these facts. As the Court explained in *Miranda*:

> [G]eneral questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

384 U.S. at 477-478 (footnote omitted). Even for persons in custody who have affirmatively invoked their rights, *Miranda* cannot "sensibly be read to create a *per se* proscription of indefinite duration" (*Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975)); a fortiori, no permanent right of privileged silence exists for persons such as petitioner who are not subjected to custodial interrogation and who have not affirmatively asserted the rights described in *Miranda*.

There is, moreover, no possibility here that petitioner was "misled" by the prosecutor's *Miranda* warnings, which were given at the outset of his original interview.[30] Petitioner was notified during

[30] Even though petitioner was not subject to custodial interrogation or arrest, the United States Attorney gave him *Miranda* warnings as an additional safeguard at the com-

that interview that the extent of his cooperation would be determinative of the charges brought against him and would be made known to the court by the prosecutor (App. 16, 29-30, 35-36). Subsequent plea negotiations focused on the effort to secure his cooperation, and the subject was addressed in the government's presentence memorandum (App. 16-17). Under these circumstances, petitioner could not have entertained the belief that his refusal to cooperate was "privileged" or that the government did not intend to allocute based on his non-cooperation. There is thus no inherent "unfairness" here of the kind that may result when a suspect is led to believe that his silence during custodial interrogation will not be used against him, but the silence is nonetheless adduced as incriminating evidence at trial. See *Doyle* v. *Ohio*, 426 U.S. 610, 618 (1976).

2. Rather than occurring during custodial interrogation, petitioner's refusal to cooperate was manifested throughout a continuous process of plea negotiation. From the beginning, he was invited to enter into an agreement with the government that would involve his identification of his heroin supplier. This negotiation continued after petitioner was indicted and had retained counsel. As a result of these negotiations, petitioner decided to waive his own Fifth Amendment rights by pleading guilty. The pressures and inducements that led petitioner to waive his own

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mencement of the interview (App. 16 & n.4). The United States Attorney also urged petitioner to consult with a lawyer to discuss the advisability of cooperating with the government (Oct. 17, 1975 Tr. 10-11, 31).

Fifth Amendment rights were entirely proper. See, *e.g.*, *Corbitt* v. *New Jersey*, 439 U.S. 212, 218-224 (1978); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363-365 (1978); *Brady* v. *United States*, 397 U.S. 742, 752-753 (1970).[31] If the government could properly bargain with petitioner to incriminate himself, it could certainly do so to obtain incriminating information about *others*. See ABA, *Minimum Standards for Criminal Justice: Pleas of Guilty*, *supra*, at § 1.8(a)(v). Petitioner had ample opportunity to consult with counsel, to explain to the prosecutor any reasonable fear of additional incrimination or for his safety, and to request immunity from prosecution for "other crimes" or protection from retaliation as part of his bargain. Nothing in *Miranda* suggests that it is improper for the prosecutor to bargain for cooperation or to advise the sentencing court of the convicted defendant's refusal to cooperate by providing information about his accomplices.

3. In any event, we note that the major premise of petitioner's argument (Br. 8-9, 18; see also Amici Br. 21-30)—that his "silence" was penalized—is without factual basis. Petitioner was anything but "silent." During his first interview, he disclosed his own illegal activities.[32] Rather than remaining silent

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[31] There is no doubt that requests for cooperation from prosecutors place pressure on defendants to make disclosures contrary to their wishes. But the criminal justice system is replete with "hard choices," some of which involve waivers of Fifth Amendment rights. See *Corbitt* v. *New Jersey*, *supra*.

[32] As noted above, this confession was later found to be a voluntary waiver of his *Miranda* rights. See *North Carolina* v. *Butler*, No. 78-354 (Apr. 24, 1979).

about his co-conspirators, he evasively stated that he could not furnish the requested information because he was not "that involved" in the conspiracy (App. 30; see also Oct. 17, 1975 Tr. 12, 33). This disingenuous explanation, repeated during allocution, could properly be considered in imposing sentence.

Petitioner's express waiver of his own Fifth Amendment rights, coupled with an implausible explanation for refusing to provide information about other persons, cannot logically be viewed as an invocation of any constitutional right to refrain from self-incrimination. See *United States* v. *Goldman*, 563 F.2d 501, 503-504 (1st Cir. 1977), cert. denied, 434 U.S. 1067 (1978) ("After hearing the *Miranda* warnings * * * he answered most of the agent's questions * * *. We can find no passage in the record, however, where Goldman did indicate that he wished to reassert his right to remain silent."); *United States* v. *Joyner*, 539 F.2d 1162, 1165 (8th Cir.), cert. denied, 429 U.S. 983 (1976) ("Joyner was apprised of his *Miranda* rights and responded that he understood them. With that knowledge he chose to answer questions. * * * His statement that he would not reveal the exact location of the [stolen] truck was a direct answer freely given, not an ambiguous assertion of his right to remain silent."); *United States* v. *Agee*, 597 F.2d 350, 354-356 (3d Cir.) (en banc), cert. denied, No. 78-6482 (June 18, 1979). See also *Fare* v. *Michael C.*, No. 78-334 (June 20, 1979), slip op. 19-20 ("at some points he did state that * * * he could not, or would not, answer the question, but

these statements were not assertions of his right to remain silent").

Finally, petitioner's counsel, far from relying on a right of silence, expressly directed the sentencing court's attention to the subject of petitioner's cooperation, his admission of his own culpability, and his refusal to incriminate others due to his purported limited role in the conspiracy (App. 29-30). At no time did counsel object to the consideration of this subject during the sentencing hearing (see *Michigan* v. *Mosley*, *supra*, 423 U.S. at 100), or otherwise suggest that petitioner's Fifth Amendment rights were implicated or threatened by the proceedings.

In sum, the facts involved in *Miranda* are far removed from those presented here. The holding and reasoning of that case have no application to present circumstances.

III. PETITIONER'S SENTENCE, IMPOSED WITHIN STATUTORY LIMITS AND WITHOUT INFRINGEMENT OF HIS CONSTITUTIONAL RIGHTS, IS NOT SUBJECT TO APPELLATE REVIEW ON A "SUPERVISORY" BASIS

Amici argue (Amici Br. 31-37) that petitioner's sentence should be vacated pursuant to the "supervisory powers" of this Court, even if the sentence does not infringe his constitutional rights.

This Court repeatedly has disavowed any such "supervisory" role in reviewing criminal sentences imposed within statutory limits. As the Court noted in *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974), quoting *Gurera* v. *United States*, 40 F.2d 338, 340-341 (8th Cir. 1930): "If there is one rule

in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." This rule applies when substantial consecutive sentences are imposed. See *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932).

The Court has not hesitated, of course, to vacate sentences imposed in a manner that violates the convicted defendant's constitutional rights. For example, in *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948), the Court set aside a sentence that was based on information "extensively and materially false, which the prisoner had no opportunity to correct * * *." See also *United States* v. *Tucker*, *supra*, 404 U.S. at 446-449 (prior convictions obtained in violation of the right to counsel cannot be considered in determining sentence).[33] In the present case, however, the extent of petitioner's cooperation with the government was not in dispute. The facts were brought to the attention of the sentencing court by defense counsel. If counsel wished to add any further information in mitigation, he was perfectly free to do so. He elected, however, not to proffer any information—beyond the evasive explanation previously discussed—about petitioner's reasons for not cooperating.[34]

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[33] We also assume that a sentence based on invidious criteria such as race, religion, or indigency would be subject to appellate review. See *Williams* v. *Illinois*, 399 U.S. 235 (1970). This case raises no such issue.

[34] As noted above, petitioner argues in this Court that any inquiry into his reasons for not cooperating would have been "improper" (Br. 11-12).

Amici also argue that petitioner's sentence should be set aside on a supervisory basis because the district court participated impermissibly in the plea bargaining process (Amici Br. 32-33). However, they cite nothing in the record that suggests that the district court "participated" in plea bargaining discussions in violation of Fed. R. Crim. P. 11(e)(1). Instead, they contend that the district court's consideration of "non-cooperation" as an aggravating factor "distorted" the plea bargaining process by reducing the number of petitioner's "bargaining chips." However, the trial court did not take away any of petitioner's "bargaining chips." He had almost none to begin with. He confessed his illegal activities as a heroin dealer from the outset. The prosecutor possessed tape recordings of the telephone calls in which petitioner made the heroin sale arrangements (App. 15-16). Petitioner flatly refused to cooperate with the government; he did not seek to obtain immunity from prosecution with respect to other crimes or request police protection against possible attempts to "retaliate" against him. His prior criminal record showed unmistakably that he posed a serious threat to the community and had poor prospects for rehabilitation. In sum, petitioner's own actions, not those of the trial court, resulted in his having few "bargaining chips." [35]

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[35] In his separate statement in the court of appeals, Judge Bazelon asserted that the district court improperly intruded into the plea bargaining process by announcing a "policy of differential sentencing" for those who cooperate and those

Amici finally argue that the district court's sentencing procedure gave rise to an improper appearance of "collusion" between judge and prosecutor (Amici Br. 36-37). However, the district court took no part in the plea negotiations. It did not take any action to coerce petitioner into cooperating, such as threatening petitioner prior to sentencing with an enhanced sentence if he withheld cooperation. It simply made a retrospective review of the evidence of petitioner's criminal conduct, his past record, and his past refusal to cooperate with the authorities in reaching a sentencing decision. Defense counsel and the prosecutor had an equal opportunity to allocute before the court. See Fed. R. Crim. P. 32(a)(1); ABA, *Minimum Standards for Criminal Justice: Sentencing Alternatives and Procedures, supra,* at § 5.3. As noted on pages 24-26, *supra*, the sentencing process requires the court to make this kind of inquiry, considering all pertinent evidence presented both by the prosecutor and defense counsel. In sum, the sentencing was entirely proper both procedurally and substantively, and there is no basis for disturbing petitioner's sentence on appeal.

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who do not (Pet. App. 11a). In this regard, Judge Bazelon placed reliance on the court's prior decision in *Scott* v. *United States*, 419 F.2d 264 (D.C. Cir. 1969) (Pet. App. 8a, 11a). Three observations are pertinent in this connection. First, the district court did not announce any sentencing "policy." Rather, it examined all of the relevant facts involved in this particular case and imposed an appropriate sentence. Second, the *Scott* opinion has never received the approval of this Court. See *United States* v. *Grayson, supra,* 438 U.S. at 51-52. Finally, the decisions of this Court recognize the propriety of following a differential policy in sentencing those who cooperate and those who do not. See, *e.g., Corbitt* v. *New Jersey, supra,* 439 U.S. at 224 (footnote omitted), emphasizing the "constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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